

Before the
Administrative Hearing Commission
State of Missouri



AMY CROUCH,

Petitioner,

vs.

MISSOURI BOARD OF COSMETOLOGY
AND BARBER EXAMINERS,

Respondent.

No. 13-1177 CB

DECISION

We grant Petitioner Amy Crouch a probationary cosmetology establishment license.

Procedure

Ms. Crouch filed her complaint on June 27, 2013. Respondent Missouri Board of Cosmetology and Barber Examiners filed its answer on August 7, 2013.

We held a hearing on November 12, 2013. Ryan Karaim represented Ms. Crouch, and she also appeared in person. Tina Crow-Halcomb represented the Board, and its executive director, Emily Carroll, appeared in person.

We notified the parties on January 22, 2014, after the transcript of hearing was prepared, that no post-hearing briefs were necessary, but that we would accept any briefs filed by January 28, 2014. Neither party filed a brief. This case became ready for our decision on January 28, 2014.

Findings of Fact

1. The Board granted Ms. Crouch a cosmetologist license in 2005. Ms. Crouch renewed her license on October 31, 2013. Ms. Crouch's cosmetologist license was active and valid at all times relating to this action.

2. Ms. Crouch worked at Araby Salon in Kansas City, Missouri, for six months in 2012. In May or June of 2012, Ms. Crouch applied for and received an establishment license from the Board for her practice of cosmetology at Araby Salon.

3. In January 2013, Ms. Crouch switched locations and began renting a booth at Blo Salon in Kansas City, Missouri. Ms. Crouch provided cosmetology services at that location.

4. Ms. Crouch did not apply to transfer her establishment license from Araby Salon when she began working at Blo Salon. She also did not file an application for a new establishment license when she moved.

5. On February 2, 2013, Ms. Crouch colored and cut a client's hair. The client was unhappy with the service she received and filed a consumer complaint with the Board.

6. As a result of the complaint, the Board conducted an inspection at Blo Salon on March 12, 2013. Ms. Crouch was not present at that time. During the inspection, the Board's inspector found that Ms. Crouch did not have an establishment license posted in her rented booth. The inspector left an establishment license application form for Ms. Crouch with Blo Salon's manager.

7. Ms. Crouch was confused about the need for an establishment license at Blo Salon and the application process. She was under the impression that the owner of the salon needed to obtain his city business license before she could apply for the establishment license. She was also aware that other booth renters at Blo Salon did not at the time have establishment licenses.

8. The Board sent Ms. Crouch a violation letter around April 5, 2013 regarding the March 12, 2013 inspection and explaining that Ms. Crouch needed to obtain an establishment license. At about the same time, the Board notified Ms. Crouch to appear at a May 19-20, 2013 meeting of the Board to discuss the consumer complaint it had received against her.

9. The Board conducted a second inspection of Blo Salon on April 18, 2013. Ms. Crouch was not present. The Board's inspector found that Ms. Crouch did not have an establishment license posted in her rented booth and that "there was no EPA registered disinfectant available for the disinfection of all implements."¹

10. The same day as the inspection, Ms. Crouch sent an application for an establishment license to the Board accompanied by a check for the \$100 fee. The Board did not receive the application and check until June 24, 2013. The Board does not know what caused the delay.

11. The Board sent Ms. Crouch a violation notice on May 3, 2013,² relating to the April 18 inspection, and explaining that she needed to obtain an establishment license. The Board included an application form with its letter.

12. Ms. Crouch appeared before the Board on May 19 or 20, 2013. Separate from the consumer complaint issue mentioned in the Board's notification, the Board asked Ms. Crouch why she had not submitted an application for an establishment license. Ms. Crouch told the Board that she had already submitted the application.

¹ Tr. 121.

² The Board sent Ms. Crouch a notice on April 24, 2013. Resp. Ex. D. The Board made several errors in that letter. Tr. 136. The Board sent out a second notice dated May 3, 2013, Resp. Ex. E., that addressed the April 18, 2013 inspection and was intended to replace the April 24 letter. Tr. 136.

13. Ms. Crouch submitted a second application for an establishment license on May 23, 2013.³

14. The Board found that there was cause to deny Ms. Crouch's application because Ms. Crouch operated as a cosmetologist without a valid establishment license, in violation of § 329.140.2(4), (5), (6), (7), (10), and (13)⁴, and 20 CSR 2085-10.010.⁵

15. The Board issued an order on May 31, 2013, granting Ms. Crouch a cosmetology establishment license, subject to a three-year term of probation and the following conditions:

A. During the disciplinary period, Crouch shall comply with all provisions of Chapter 329, RSMo, all applicable board regulations, all applicable federal and state drug laws, rules, and regulations and all other applicable federal and state criminal laws. "State" includes the state of Missouri, all other states and territories of the United States, and the ordinances of their political subdivisions.

B. During the disciplinary period, Crouch shall keep the Board informed of the current work and home telephone numbers. Crouch shall notify the Board in writing within ten days (10) of any change in this information.

C. During the probationary period, Crouch shall timely renew the cosmetology establishment license granted hereby and shall timely pay all fees required for licensure and comply with all other Board requirements necessary to maintain said license in a current and active state.

D. During the probationary period, Crouch shall accept and comply with unannounced visits from the Board's representatives to monitor compliance with the terms and conditions of this Order.

³ The Board subsequently recognized Ms. Crouch had submitted duplicate applications and paid the \$100 fee twice, so refunded \$100 to Ms. Crouch.

⁴ All references to § 329.140 are to the Revised Statutes of Missouri (2000). All other statutory references are to the Revised Statutes of Missouri (Supp. 2012), unless otherwise noted.

⁵ References to "CSR" are to the Missouri Code of State Regulations, as current with amendments included in the Missouri Register through the most recent update.

E. During the disciplinary period, Crouch shall appear in person for interviews with the Board or its designee upon request.

F. Crouch shall submit written reports to the board on or before January 1 and July 1 during each year of the probationary period stating truthfully whether there has been compliance with all terms and conditions of this Order. The first such report shall be received by the Board on or before July 1, 2013.^[6]

Conclusions of Law

We have jurisdiction to hear Ms. Crouch's complaint. § 621.045.

When an applicant appeals the denial of an unrestricted license, we exercise the same authority as the licensing agency and decide the application anew, without deference to the agency's decision. *See State Bd. of Regis. for the Healing Arts v. Trueblood*, 368 S.W.3d 259, 264 (Mo. App. W.D. 2012).

Here, the Board bears the burden of establishing that probation is appropriate, § 324.038.2, which it must do by a preponderance of the evidence, *see State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App. W.D. 2000). A "preponderance of the evidence" is that degree of evidence that "is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows the fact to be proved to be more probable than not." *Id.*

The answer the Board files in an appeal before this Commission provides notice of the grounds for its decision. *See Ballew v. Ainsworth*, 670 S.W.2d 94, 103 (Mo. App. E.D. 1984). Here, the Board points to six grounds under § 329.140⁷:

⁶ "Exhibit F" to Respondent's Answer.

⁷ The Board did not explicitly set out these grounds in its answer. But the Board pled that it would "defend the action of the Board." *Answer*, p. 3. The Board attached to the answer as "Exhibit F" a copy of its Order granting Ms. Crouch a probationary license. The Board explicitly cited in its Order the above-cited grounds for issuing a probationary license, and we therefore conclude they have been sufficiently pled.

2. The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621, RSMo, against any holder of any certificate of registration or authority, permit or license required by this chapter or any person who has failed to renew or has surrendered the person's certificate of registration or authority, permit or license for any one or any combination of the following causes:

- (4) Obtaining or attempting to obtain any fee, charge, tuition or other compensation by fraud, deception or misrepresentation;
- (5) Incompetence, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of the functions or duties of any profession licensed or regulated by this chapter;
- (6) Violation of, or assisting or enabling any person to violate, any provision of this chapter, or of any lawful rule or regulation adopted pursuant to this chapter;
- (7) Impersonation of any person holding a certificate of registration or authority, permit or license or allowing any person to use his or her certificate of registration or authority, permit, license or diploma from any school;

- (10) Assisting or enabling any person to practice or offer to practice any profession licensed or regulated by this chapter who is not licensed and currently eligible to practice under this chapter; [or]

- (13) Violation of any professional trust or confidence[.]

The factual basis for each of these grounds relates to Ms. Crouch's failure to obtain an establishment license. We note that the parties presented detailed testimony and evidence at hearing about the consumer complaint that led to the original inspections of Ms. Crouch's booth. The Board did not cite the consumer complaint in its Answer as a basis for its decision to issue a license subject to probation. And the Board's executive director testified at the hearing herein

that “the Board has no authority over [complaints about] the quality of the service.”⁸ We therefore do not examine the details of the consumer complaint.

Subsection (4)—Obtaining compensation by fraud,
deception or misrepresentation

We may deny a license to applicant who uses fraud, deception, or misrepresentation to gain compensation. § 329.140.2(4).

The terms are not statutorily defined for purposes of § 329.140. But § 334.100.2(4), relating to physician license discipline, is analogous here and uses the terms fraud and misrepresentation. In a proceeding under § 334.100, the Court of Appeals defined fraud as “an intentional perversion of truth to induce another ... to act in reliance upon it,” and misrepresentation as “a falsehood or untruth made with the intent of deceit rather than inadvertent mistake.” *Hernandez v. State Bd. of Regis’n for the Healing Arts*, 936 S.W.2d 894, 899 n.2 and n.3 (Mo. App. W.D. 1997).

Deception is a term of art, which the Supreme Court has defined as a “species of common law fraud,” an act “designed to deceive, to cheat someone by inducing their reliance on clever contrivance or misrepresentation.” *State ex rel. Nixon v. Telco Directory Publishing*, 863 S.W.2d 596, 600 (Mo. 1993).

Misrepresentation is “a falsehood or untruth made with the intent of deceit rather than inadvertent mistake.” *Hernandez*, 936 S.W.2d at 899 n.3.

Ms. Crouch did not lie about having an establishment license, or attempt to deceive anyone about her establishment license. Absent a lie or deliberate untruth, we cannot find fraud, deception, or misrepresentation.

We find no cause to deny Ms. Crouch a license under § 329.140.2(4).

⁸ Tr. 124.

Subsection (5)—Violation of Professional Standards

We may deny a license to an applicant who is guilty of “incompetence, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of the functions or duties of” a cosmetologist.

A cosmetologist is a person who engages in the practice of cosmetology for compensation. § 329.010(4) and (5). A hairdresser, such as Ms. Crouch, is a cosmetologist. § 329.010(5). The functions and duties of a hairdresser are:

arranging, dressing, curling, singeing, waving, permanent waving, cleansing, cutting, bleaching, tinting, coloring or similar work upon the hair of any person by any means; or removing superfluous hair from the body of any person by means other than electricity, or any other means of arching or tinting eyebrows or tinting eyelashes.

§ 329.010(5)(a).

Incompetency is a general lack of professional ability, or a lack of disposition to use an otherwise sufficient professional ability. *Albanna v. State Bd. of Regis. for Healing Arts*, 293 S.W.3d 423, 435 (Mo. 2009). Incompetency is not necessarily established by a negligent act, or even a series of negligent acts, but by demonstration that the professional is unable or unwilling to function properly. *Id.* at 436; *Tendai v. State Bd. of Regis. for Healing Arts*, 161 S.W.3d 358, 369 (Mo. 2005).

In the context of professional licenses and discipline, Missouri courts define “misconduct” as “the willful doing of an act with a wrongful intention.” *See Duncan v. Mo. Bd. for Architects, Professional Engineers and Land Surveyors*, 744 S.W.2d 524, 541 (Mo. App. E.D. 1988).

Gross negligence is a deviation from professional standards so egregious that it demonstrates a conscious indifference to a professional duty. *Id.* at 533.

Fraud is “an intentional perversion of truth to induce another ... to act in reliance upon it[.]” *Hernandez*, 936 S.W.2d at n.2.

Misrepresentation is “a falsehood or untruth made with the intent of deceit rather than inadvertent mistake.” *Id.* at 899 n.3.

Dishonesty is “a disposition to defraud, deceive, or betray.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 650 (1986).

Up to mid-April 2013, Ms. Crouch was confused about the application process and her need to obtain a license. Further adding to that confusion, between mid-March and mid-April 2013, the Board sent her a letter notifying her that she should attend a Board meeting to discuss the consumer complaint it had received against her. The Board’s letter apparently did not mention her lack of an establishment license. Ms. Crouch is not incompetent simply because she did not apply for the establishment license until mid-April 2013. Nor do we find that such behavior demonstrates an egregious deviation from professional standards demonstrating gross negligence. For the same reasons stated in the previous section, we do not find fraud or misrepresentation. And because Ms. Couch did not make any affirmative attempts to deceive, we do not find dishonesty.

We do, however, find misconduct, the term with the lowest level of culpability among the ones provided in § 329.140.2(5). The Board inspected Ms. Crouch’s booth on March 12, 2013 and left an application for her. The Board also notified her by letter on April 5, 2013 that she was in violation of law and regulation because she did not have an establishment license, and instructed her to apply. She did not file an application for one until April 18, 2013, and continued to operate notwithstanding. Such behavior was willful. She therefore committed misconduct.

We find that there is cause to deny Ms. Crouch a license under § 329.140.2(5), based on misconduct, but not on incompetence, gross negligence, fraud, misrepresentation or dishonesty.

Subsection (6)—Violation of Laws

We may deny a license to an applicant who has violated any part of Chapter 329.

Under § 329.030,⁹ a person may not operate a cosmetology establishment without the proper licenses. Under § 329.045.1, each cosmetology establishment is required to have an establishment license. A “cosmetology establishment” includes a booth rented for the purpose of providing cosmetology services. § 329.010(6).

The undisputed evidence shows that Ms. Crouch rented a booth and performed cosmetology services at Blo Salon beginning in January 2013. Ms. Crouch did not apply for an establishment license until about April 18, 2013 and the Board did not issue her license until May 31, 2013. We attribute some of the delay to the Board. We conclude Ms. Crouch violated §§ 329.030 and 329.045.1 from January 2013 through April 18, 2013.

There is cause to deny Ms. Crouch a license under § 329.140.2(6).

Subsection (7)—Use of Another Person’s License or Certificate

We may deny a license if the applicant impersonates a person having a valid license or if she allows another person to use her license. There is no evidence in the record that Ms. Crouch did so.

There is no cause to deny Ms. Crouch a license under § 329.140.2(7).

Subsection (10)—Assisting an Unlicensed Person to Practice

We may deny a license if an applicant has “[a]ssist[ed] or enable[ed] any person to practice or offer to practice any profession licensed or regulated by this chapter who is not licensed and currently eligible to practice under this chapter[.]” § 329.140.2(10).

⁹ RSMo (2000).

“Assist” is defined as “to give support or aid.” WEBSTER’S THIRD INTERNATIONAL DICTIONARY UNABRIDGED 132 (1986). “Enable” is “to render able : give power, strength, or competency.” *Id.* at 745. We find that both assisting and enabling, under these definitions, require assisting or enabling *another* person and we conclude that the General Assembly intended subsection (10) to apply only to cases of a licensee's aiding another person to practice without a license. There is no evidence that Ms. Crouch aided another person to practice without a license.

There is no cause for us to deny her a license under § 329.140.2(10).

Subsection (13)—Professional Trust or Confidence

The Board alleges that Ms. Crouch’s conduct violated the professional trust or confidence of Ms. Crouch’s clients. The dictionary definition of “professional” is

of, relating to, or characteristic of a profession or calling...[;]...
engaged in one of the learned professions or in an occupation
requiring a high level of training and proficiency...[;
and]...characterized or conforming to the technical or ethical
standards of a profession or an occupation....

WEBSTER’S THIRD NEW INT’L DICTIONARY UNABRIDGED 1811 (1986). “Trust” is “assured reliance on some person or thing [;] a confident dependence on the character, ability, strength, or truth of someone or something...[.]” *Id.* at 2456. “Confidence” is a synonym for “trust.” *Id.* at 475 and 2456. Trust “implies an assured attitude toward another which may rest on blended evidence of experience and more subjective grounds such as knowledge, affection, admiration, respect, or reverence[.]” *Id.* at 2456. Confidence “may indicate a feeling of sureness about another that is based on experience and evidence without strong effect of the subjective[.]” *Id.* In short, professional trust or confidence is the reliance on the special knowledge and skills evidenced by professional licensure.

Although obtaining proper licensure may be a function or duty of a profession, on the instant record we cannot conclude that obtaining a cosmetology establishment license involves the rendering of a special skill peculiar to the profession.

There is no cause for denial of a license under § 329.140.2(13).

Ms. Crouch should receive a license subject to probation

Under § 324.038.1, the Board has the discretion to issue a license subject to probation, in lieu of refusing to issue a license altogether, when grounds exist that would suffice as cause for discipline under § 329.140. Here, we exercise the same discretion as the Board. The Board argues Ms. Crouch should be issued a license subject to a three-year probation and various conditions. We impose a shorter period of probation and different conditions.

As addressed above, the violation of law in this case concerns Ms. Crouch's failure to apply for an establishment license as required by § 329.045.1. Emily Carroll, the executive director for the Board, candidly testified that "[t]here is confusion" in the profession about the need for establishment licenses for cosmetologists.¹⁰ Ms. Carroll further testified that multiple cosmetologists and barbers call the Board "[e]very single day" asking questions about establishment licenses and moving their salons or renting new booths, and that Board licensees frequently rely on information about establishment licenses that is passed from person to person and does not come from the Board.¹¹

In view of the confusion relating to establishment licenses among licensees in general and Ms. Crouch's confusion in specific, we conclude that education on the law and regulations

¹⁰ Tr. 128, 147.

¹¹ Tr. 128.

concerning establishment licenses, cosmetologist licenses, and their renewal is appropriate here.¹² Such education should prevent the situation that arose here from reoccurring.

We therefore order Ms. Crouch to review the following laws and regulations within 90 days of the date of our decision herein:

§ 329.045, RSMo	Registration of establishment, inspection, fee, display of license
§ 329.140, RSMo	Denial, revocation, or suspension of certificate, grounds for
20 CSR 2085-4.010	Renewal Dates
20 CSR 2085-4.020	Change of Name and Mailing Address
20 CSR 2085-7.040	Cosmetologist Renewal and Inactive Status Requirements
20 CSR 2085-10.010	Licensing—Barber Establishments and Cosmetology Establishments
20 CSR 2085-10.020	Barber and Cosmetology Establishment License Changes
20 CSR 2085-10.060	Unlicensed Activity

We further order Ms. Crouch to notify the Board, in writing and within the same 90-day period, that she has reviewed these laws and regulations, and that she understands her obligations under these laws and regulations.

We grant Ms. Crouch a cosmetologist establishment license subject to a 90-day period of probation and the foregoing conditions.

¹² We recognize that Ms. Crouch testified that she “fully and completely” understands that she needs to keep her establishment licenses current. Tr. 56. While we do not doubt that statement, we find that additional education on all aspects of cosmetologist licensing is necessary to ensure that Ms. Crouch fully complies with Missouri law in the future.

Conclusion

Cause exists to deny Ms. Crouch a cosmetologist establishment license based on violations of § 329.140.2(5) with respect to misconduct, and § 329.140.2(6).

In lieu of denial, we grant Ms. Crouch a cosmetologist establishment license under §329.036.2, subject to a 90-day probation and the condition set out above.

SO ORDERED on January 30, 2014.

\s\ Alana M. Barragán-Scott
ALANA M. BARRAGÁN-SCOTT
Commissioner